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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

vs.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

On Appeal from the Minnesota Supreme Court

BRIEF OF THE MINNESOTA CIVIL LIBERTIES UNION *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

Table of Authorities ii

Interest of Amicus 1

Introduction and Summary of Argument 2

Argument 9

I. The "Big Newspaper Tax" Applies Only to a Few Newspapers, and Is Not an Ordinary Part of a General System of Sales and Use Taxes. 9

II. The "Big Newspaper Tax" Is Similar in Form, Impact and Potential to the Stamp Taxes and Taxes on Paper That It Was Among the First Amendment's Purposes to Forbid 16

III. The Minnesota Supreme Court Correctly Stated That Strict Scrutiny Was Appropriate, But Failed to Apply That Rule; Analysis of the Facts Shows, However, That Even the Minimum Rationality of the Statute Is in Doubt . . . 33

Conclusion 41

TABLE OF AUTHORITIES

CASES:

Allied Stores v. Bowers,
358 U.S. 522 (1959) 38

American Press Co. v. Grosjean,
10 F. Supp. 161 (E.D. La.
1935) 5, 27

Buckley v. Valeo,
424 U.S. 1 (1976) 7, 38

Citizens Against Rent Control v.
City of Berkeley,
102 S.Ct. 434 (1981) 38

City of Tampa v. Tampa Times,
153 Fla. 709, 15 So.2d
612 (1943) . . . . . 4 n. 2

Cleveland Board of Education v.
LaFleur,
414 U.S. 632 (1974) 37

Elrod v. Burns,
427 U.S. 347 (1976) 34

First National Bank of Boston v.
Bellotti,
435 U.S. 765 (1978) 38

Giragi v. Moore,
49 Ariz. 74, 64 P.2d 819,
appeal dismissed, 301 U.S.
670 (1937) 30, 32

Griswold v. Connecticut,
381 U.S. 479 (1965) 37

Grosjean v. American Press Co.,
297 U.S. 233 (1936) . . . 4, 5, 6,
17, 27, 28, 29, 30, 32, 31 n. 7

Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) 12, 31

Minneapolis Star and Tribune Co. v. Commissioner of Revenue, 314 N.W.2d 201 (Minn. 1981) . . . . 4, 6, 7, 11, 13 n. 6, 14, 29, 35, 36, 39, 40

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 37

Reynolds v. Sims, 377 U.S. 533 (1964) 11

Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, rehearing denied, 295 U.S. 768 (1935) . . . .33 n. 8

STATUTES:

Minn. Laws 1971, Sp. Sess., ch. 31, art. 1, § 5 subd. 1(i) 9

Minn. Stat. § 297A.02 14

Minn. Stat. § 297A.03 40

Minn. Stat. § 297A.14 . . . . . 3, 5, 14, 15, 35, 36

Minn. Stat. 297A.24 . . . . . 14, 15

Stamp Act of 1712, 10 Anne cap. 18 . . . . . 17, 27

W. Va. Code § 11-15-9(12) 40

BOOKS:

Brant, The Bill of Rights (1967) . . 5

Chafee, Free Speech in The United States (1967) 17

Collett, History of the Taxes on Knowledge (1899) 17

Doyle, The Sign of Four (1890) . . . 40

Duniway, The Development of Freedom of the Press in Massachusetts (1906) 20, 21, 22

Hamilton, The Federalist No. 84. . . 25

Jensen, The Founding of a Nation (1968) 18, 21

Levy, Freedom of the Press from Zenger to Jefferson (1966) . 23, 25

Levy, Judgments: Essays on American Constitutional History (1972) 20

Lofton, The Press as Guardian of the First Amendment (1980) . 18, 19

McCoy, Freedom of the Press (1978) 22

Morgan, The Stamp Act Crisis (1953) 23

Nowak, Rotunda, & Young, Constitutional Law (1978) 34

Pole, Foundations of American Independence, 1763-1815 (1973) 17, 18, 19

Schwartz, The Bill of Rights: A Documentary History (1971) 25, 26

Siebert, Freedom of the Press in England 1776-1776 (1952) 17

MISCELLANEOUS:

Minn. Atty. Gen. Op. No. 90 (1948) 39

St. Paul Dispatch or Pioneer/Press Dispatch 2, 12, 13, 40

INTEREST OF AMICUS[1]

The Minnesota Civil Liberties Union (MCLU) is a private, non-profit, membership-only organization having approximately 3,500 members in the State of Minnesota. It is a state affiliate of the American Civil Liberties Union and has as its purpose the protection of the rights and liberties preserved to the people by the Minnesota and United States Constitutions. Foremost among those liberties is the freedom of speech and the press, and the MCLU has been active in the defense of these freedoms against laws that limit the flow of information the first amendment was enacted to secure.

The law at issue here substantially abridges first amendment rights and de-

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[1] Letters from both parties consenting to the filing of the brief have been lodged with the Clerk of this Court.

nies equal protection of the laws by singling out a few large newspapers for a heavy tax. Because of the severe threat such taxes will pose, if upheld, to our nation's fragile and crucial major newspapers, the Minnesota Civil Liberties Union submits this brief amicus curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief and the appellant's jurisdictional statement are being filed at a poignant moment: just after the announcement that the afternoon Star will be merged into the morning Tribune. According to a front-page story in the St. Paul Dispatch, March 24, 1982, "about 35 reporters and editors and 20 newsroom support people are facing layoffs. About 35 positions will be eliminated in the production and distribution departments." Even more significant losers, however,

will be the Star's 170,000 readers, as Minneapolis follows a sad national trend. The Star joins a casualty roll that already includes the Washington Star, the Philadelphia Bulletin, the Chicago Daily News and many others.

The present case is a constitutional challenge to Minnesota's "big newspaper tax," Minn. Stat. § 297A.14, third paragraph, which exploits the two major newspaper companies in the Twin Cities of Minneapolis and St. Paul as a revenue source while having little effect, and in almost all cases no effect at all, on the hundreds of other newspapers in the state. The tax is paid only by publishers, and there is no evidence that it has ever been paid by anyone except publishers of newspapers. In 1974 and 1975, the only years for which data appear in the record, the two major Twin Cities newspaper companies paid almost 91% of all

taxes collected under this law, and only eleven others paid anything at all in either year. Minneapolis Star and Tribune Co. v. Commissioner of Revenue, 314 N.W.2d 201, 203-204 (Minn. 1981).

It appears that no other state has a "big newspaper tax" of any sort at present, and the only closely similar statute of which we are aware is the Louisiana tax on newspapers with circulations exceeding 20,000 struck down by this Court in Grosjean v. American Press Co., 297 U.S. 233 (1936).[2] As in this case, the Louisiana statute was challenged on

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[2] Another somewhat similar case is City of Tampa v. Tampa Times, 153 Fla. 709, 15 So.2d 612 (1943), in which the Florida Supreme Court, relying on Grosjean, struck down a city license tax on newspapers of $40 for newspapers with less than 10,000 circulation, $500 from 10,000 to 30,000 circulation, and $700 for circulation exceeding 30,000. The facts of the present case, however, are much more dramatic: all newspapers paid at least $40 in Tampa, whereas 97% pay nothing in Minnesota, and the difference between the largest and the smallest was only $660 in Tampa, but is over $600,000 in Minnesota.

both first amendment and equal protection grounds. The Grosjean Court, however, in an opinion signed by Justice Sutherland but reportedly including a substantial contribution by Justice Cardozo,[3] spoke eloquently of the impossibility of such a tax under the first amendment, but found it unnecessary to reach the question of equal protection.[4]

The present case was an action for a refund brought by the Minneapolis Star and Tribune Company, which alone paid 67 and 68 percent of all taxes collected under this law in 1974 and 1975. The state District Court held the third paragraph of § 297A.14 unconstitutional under the free press and equal protection provi-

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[3] See I. Brant, The Bill of Rights 397-399 (1967).

[4] The district court, however, had found the Louisiana tax unconstitutional on equal protection grounds. American Press Co. v. Grosjean, 10 F. Supp. 161 (E.D. La. 1935).

sions of the United States and Minnesota Constitutions, and ordered the refund.

On appeal by the Commissioner of Revenue, the Minnesota Supreme Court reversed, upholding the tax essentially on the ground that it was part of a general, broadly based scheme of sales and use taxes. Minneapolis Star and Tribune Co. v. Commissioner of Revenue, 314 N.W.2d 201 (Minn. 1981). From this premise, it was held to follow that no equal protection issue arose as between newspapers and others subject to sales or use taxes, and that no first amendment issue arose at all, despite Grosjean, because the tax was on businesses rather than on expression. As to the focus on two or three companies and the virtual or complete exemption for the rest, the court found no equal protection problem, noting that the distinction "may be justified as a legislative policy to give favorable tax treat-

ment to smaller enterprises,"[5] 314 N.W.2d at 209, although the Legislature had not stated this or any other justification. The court asserted that it was applying a "strict standard" of review, 314 N.W.2d at 207, but its version of strict scrutiny consisted of just two sentences:

> The sales and use tax law is a revenue-raising measure. This is perhaps the most compelling goal of a state government.

Id. Nothing in the opinion discusses whether, or even states that, the classification is necessary to the statute's articulated compelling interest.

Amicus urges that the decision of the Minnesota Supreme Court be summarily reversed, or in the alternative set for oral argument, because:

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[5] Compare Buckley v. Valeo, 424 U. S. 1, 48 (1976): "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ."

1) the rulings of the Minnesota Supreme Court were based on a grossly distorted interpretation of the facts, which is flatly contradicted by the information given in that court's own opinion;

2) the form, impact and potential for abuse inherent in the unique type of tax imposed by Minnesota make it substantially identical to the Stamp Taxes and taxes on paper that it was among the purposes of the first amendment to forbid; and

3) the Minnesota Supreme Court's novel approach to strict scrutiny, requiring a compelling interest but not that any relationship between the classification and the interest be shown, is contrary to every relevant modern decision of this Court.

ARGUMENT

I. THE "BIG NEWSPAPER TAX" APPLIES ONLY TO A FEW NEWSPAPERS, AND IS NOT AN ORDINARY PART OF A GENERAL SYSTEM OF SALES AND USE TAXES.

The predecessor of today's "big newspaper tax," in the form of a tax on paper and ink used by publishers of periodicals, was adopted by the Minnesota Legislature in 1971. Minn. Laws 1971, Sp. Sess., ch. 31, art. 1, § 5, subd. 1(i). That original law, however, applied to all paper and ink used in producing publications of all sorts, and accordingly aroused opposition from all parts of the state.

Perhaps this opposition would have led to the repeal of the tax in the Legislature's 1973 session. There is no legislative history, but it may be inferred that when the clever suggestion

was made that rural, small-town and weekly newspapers (and apparently all publications other than newspapers) be exempted by limiting the tax to annual usage in excess of $100,000, most of the opposition evaporated. A tax on New York City is a pleasant idea to Upstaters. A tax on Chicago is a pleasant idea to Downstaters. And a tax on "the Cities" is a pleasant idea to Minnesota Outstaters.

In 1974 and 1975, the only years for which data appear in the record:

1)	the two major Twin Cities companies paid a total of	$1,664,635
2)	one company in Duluth paid a total of	72,267
3)	all others combined paid a total of	99,508

Perhaps such matters should ordinarily be left to the political processes,

subject to the "one person, one vote" principle of Reynolds v. Sims, 377 U.S. 533 (1964). But this is not just a tax on the big cities; it is a tax on the big-city newspapers.

Only newspaper companies pay this tax. Only a couple of newspaper companies pay more than a nuisance amount of tax--enough, for example, to justify the lawyer's fee for the first level of court challenge. 314 N.W.2d at 203-204. The great majority, 97% of Minnesota newspapers, pay nothing at all. Other industrial users of paper and ink, including, for example, tax-exempt producers of food packaging, pay nothing at all.

In two years, the Star and Tribune Company paid more than $1.2 million.

It would be too much to claim that the "big newspaper tax" killed the Star, or was intended to. But it would not be an exaggeration to say that its contribu-

tion was significant. In the fiscal year ended February 28, 1982, the Star and Tribune Company's net operating margin was only about $3.6 million, including its newspapers in other states and its television stations. St. Paul Pioneer Press/Dispatch, March 29, 1982, at 1B, col. 2.

The Minnesota Supreme Court, however, characterized the tax as part of a general revenue-raising scheme. This Court has carefully distinquished between general business regulations, to which newspapers are subject in the same way as other businesses, and specific impositions on newspapers and expressive activity, which are highly suspect. See, e.g., Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) (Fair Labor Standards Act). Recognizing this, the Minnesota Supreme Court offered the theory that the "use tax" on newspapers,

which are not subject to a sales tax, puts them in the same position as businesses whose products are subject to the sales tax. In its view, that made both the free press objections and the equal protection objections disappear:

> It is part of a general system of sales and use taxation to which most goods (other than food, clothing, and medicine) are subject in Minnesota.[6] Unlike the type of tax found to be unconstitutional in Gros-

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[6] A footnote at this point reads, "Iowa imposes a similar tax on newsprint and ink. Iowa Code Ann. § 423.1, subd. 1 (West Supp. 1980)." The Iowa statute is indeed the only other law currently in effect that we have been able to find imposing a tax on paper and ink used by newspapers. It is far from "similar" to Minnesota's "big newspaper tax," however, because it applies to all newspapers, and even to "free newspaper[s] or shoppers guide[s]." Thus the similarity would only be to the 1971 version of the Minnesota statute, supra. Even so, it appears to share the constitutional infirmity of the Minnesota statute in that newspapers are singled out for a tax not imposed on other businesses. No decision on the constitutionality of the Iowa statute has been found.

It may not be insignificant that at least one major Iowa newspaper company, the Des Moines Register and Tribune Company, is currently in serious financial difficulty. St. Paul Dispatch, March 19, 1982, at 11B, col. 2.

> jean, sales and use taxes are now commonplace and readily accepted. [Citations omitted.]

314 N.W.2d at 207.

The claim is not, of course, that "use taxes" on the paper and ink used by newspapers are widely accepted, for they are not. Rather it is that Minnesota's tax on paper and ink must be considered part of a general system of sales and use taxes, and that systems of sales and use taxes are widely accepted. This is suspiciously close to a claim that any tax, however obvious its unconstitutionality, can be saved by re-labelling it a "use tax."

In fact, the "use tax" on paper and ink resembles other use taxes in name only. Minn. Stat. § 297A.14 imposes a use tax on various personal property "unless the [sales] tax imposed by section 297A.02 was paid on said sales price. . . ." Section 297A.24 allows a deduc-

tion for the full amount of any tax on "sale, storage, use or other consumption" of the property in any other state, adding:

> If such tax imposed in such other state was equal to or greater than the tax imposed in this state, then no tax shall be due from such person under section 297A.14.

Thus the use tax on products other than newspapers is a "compensating" use tax, whose primary effect is to equalize competition between Minnesota retailers and retailers in states with lower sales taxes.

The "use tax" on newspapers, however, has a completely different, and even opposite, effect. Far from imposing a matching burden on out-of-state competitors, it imposes an unmatched burden on a few Minnesota newspapers. Newspapers printed in other states, such as the Wall Street Journal, the Christian Sci-

ence Monitor and the New York Times (all now widely available in Minnesota cities --in fact, home delivery of the Times is now available in some areas) pay no Minnesota taxes, and would pay none however large their circulation became. Nor do they pay similar taxes in the states where they are printed. Perhaps most tellingly, they are not subject to the true compensating use tax applied to various other products from out of state. One cannot help observing that the national and out-of-state newspapers rarely criticize Minnesota politicians.

II. THE "BIG NEWSPAPER TAX" IS SIMILAR IN FORM, IMPACT AND POTENTIAL TO THE STAMP TAXES AND TAXES ON PAPER THAT IT WAS AMONG THE FIRST AMENDMENT'S PURPOSES TO FORBID.

A.

Taxation as an instrument for control of the press first appeared in England in the Stamp Act of 1712, 10 Anne cap. 18, which taxed newspapers, advertisements and paper. The history of these despised taxes and their contribution to unifying the American colonists in rebellion against England is recounted by historians such as F. Siebert, Freedom of the Press in England 1476-1776, 305-322 (1952); C. Collett, History of the Taxes on Knowledge (1899); Z. Chafee, Jr., Free Speech in the United States (1967); and by the Court in Grosjean v. American Press Co., 297 U.S. 233 (1936).

The Stamp Tax of 1765 outraged the colonists. Prime Minister George Grenville had touched "each nerve center in American life at which either economic or intellectual activity was registered." J. Pole, Foundations of American Indepen-

dence, 1763-1815, 42 (1973). "No group in America was more directly affected than the publishers of the twenty-four newspapers in the mainland colonies." M. Jensen, The Founding of a Nation 126 (1968). The 1765 act required all legal documents, official papers, books and newspapers to be printed on a stamped paper carrying a special tax. There was an additional tax on each advertisement. The tax was heavy in proportion to the value of the item taxed. Some newspapers set off their columns with heavy black mourning margins the day before the tax went into effect, while others printed silhouetted skulls and crossed bones to symbolize a dead free press. J. Lofton, The Press as Guardian of the First Amendment 2 (1980); Jensen, supra, at 127. Many publishers defied the law. "The newspapers played a tremendous role in political life from the Stamp Act on-

ward." Id. Newspapers reprinted liberally from each other, thus helping to unite the colonies. They appealed to the masses, stirred their emotions and urged them to action. Id. at 128. Thus the British themselves helped to make the American press an instrument of revolution. Lofton, supra, at 2; Pole, supra, at 423.

In 1765, an assembly of delegates from nine of the colonies met as the "Stamp Act Congress" to protest the tax. A formal complaint was issued, entitled "A Declaration of Rights and Grievances," the basic principles of which were later incorporated into the Declaration of Independence. Because of this opposition, the American Stamp Tax was repealed less than a year after its enactment. Chafee, supra, at 321.

The English were surprised by the colonists' reaction, but the history of

similar taxes in both New York and Massachusetts should have been a sufficient warning.

New York had a short-lived tax on paper from 1756 to 1760, which met with opposition including broadsides from printers about freedom of the press. L. Levy, Judgments: Essays on American Constitutional History 128 (1972).

In Massachusetts a short-lived tax on paper was in effect from January 1755 to May 1757, forcing one Boston newspaper out of business. C. Duniway, The Development of Feeedom of the Press in Massachusetts 120 (1906). The press of Massachusetts continued its agitation against the colonial government and for freedom of the press. The English governor attempted to bring a libel charge against the Boston Gazette in 1768, but the colonial legislature refused to indict the editors. The governor prorogued the leg-

islature and attempted to get an indictment from the grand jury, but it too refused. The Gazette, freed from the threat of government prosecution for libel, brought up the recent specter of the Stamp Act stating, "Only tyrants and their tools are afraid of a free press and these are the men who forged the Stamp Act and who have forged other 'chains and manacles' for the people." Jensen, supra, at 254-4.

In 1785, Massachusetts imposed a stamp tax on newspapers. This was purely a revenue measure, but there was again much agitation. The tax was denounced as "the first Stone in the fabrick of Tyranny" in the Massachusetts Centinel. It was also argued that once allowed it might become punitive and so end press freedom, and that it discriminated against Massachusetts printers, because the presses of the neighboring states

could freely send their product into Massachusetts. The tax was repealed a year later. To replace the lost revenue the state levied a tax on advertising, which was also resented. Duniway, supra, at 136-37 (emphasis in original).

One editor, Isaiah Thomas, suspended publication of his newspaper, the Massachusetts Gazette. In a letter to the editor of the Massachusetts Spy, he stated, "The tax on News-Paper Advertisements has a direct tendency not only to restrain, but to destroy, those necessary vehicles of publick information, by taking away their only support. . . ." R. McCoy (ed.), Freedom of the Press 451 (1978). The tax was repealed in 1788. Thomas resumed publication after the two-year tax with greetings of thankfulness that the legislature had restored the constitutional liberty of the press. Duniway, supra, at 137.

Richard Henry Lee of Virginia, who later signed the Declaration of Independence and was president of the Continental Congress, rose to political prominence about the time of the British Stamp Act of 1765. He thought it a threat to the rights of Englishmen, and became a popular hero and a leader of the Sons of Liberty in Virginia, in part by expressing that view. E. & H. Morgan, The Stamp Act Crisis 293-94 (1953); L. Levy (ed.), Freedom of the Press from Zenger to Jefferson 142 (1966). When the Constitution was proposed, he became a leading Anti-Federalist, and in his Letters from the Federal Farmer voiced the concerns arising from the lack of a Bill of Rights, emphasizing the fears his earlier experiences showed him to be real threats:

> All parties apparently agree, that the freedom of the press is a fundamental right, and ought not to be restrained by

any taxes, duties, or in any manner whatever. Why should not the people, in adopting a federal constitution, declare this, even if there are only doubts about it. But, say the advocates, all powers not given are reserved:--true; but the great question is, are not powers given, in the exercise of which this right may be destroyed . . . By art. 1. sect. 8. congress will have power to lay and collect taxes, duties, imports and excise. By this congress will clearly have power to lay and collect all kind of taxes whatever--taxes on houses, lands, polls, industry, merchandize, &c.--taxes on deeds, bonds, and all written instruments--on writs, pleas, and all judicial proceedings, on licences, naval officers papers, &c. on newspapers, advertisements, &c. and to require bonds of the naval officers, clerks, printers, &c. to account for the taxes that may become due on papers that go through their hands. Printing, like all other business, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it. There may be other powers given, in the exercise of which this freedom may be effected; and certainly it is of too much importance to be left thus liable to be taxed, and

> constantly to constructions and inferences.

L. Levy (ed.), Freedom of the Press from Zenger to Jefferson 143-44 (1966).

The New York Anti-Federalist Melancton Smith, in his Address to the People of New York in 1788, agreed: "We contend, that by the indefinite powers granted to the general government, the liberty of the press may be restricted by duties, &c. and therefore the constitution ought to have stipulated for its freedom." 1 B. Schwartz (ed.), The Bill of Rights: A Documentary History 576 (1971).

In response, Federalists asserted that a Bill of Rights was unnecessary because the powers of the government were enumerated and did not include any power over the press. E.g., 1 B. Schwartz, supra, at 444; The Federalist No. 84 (A. Hamilton). James Iredell, later to be a

Justice of this Court, stated:

> The liberty of the press is always a grand topic for declamation, but the future Congress will have no other authority over this than to secure to authors for a limited time an exclusive privilege of publishing their works. . . .If the Congress should exercise any other power over the press than this, they will do it without any warrant from this constitution, and must answer for it as for any other act of tyranny.

1 B. Schwartz, supra, at 454.

Federalists and Anti-Federalists are thus seen to have agreed that Congress ought not to be allowed to tax the press, and perhaps that such taxes would be contrary to natural law. They disagreed only as to whether the point needed to be spelled out as part of a Bill of Rights or could be relied on as implicit in a system of enumerated powers. In the end, the Federalists got their Constitution, but only on the understanding that a Bill of Rights would be added.

B.

Like the Stamp Act of 1712, the Massachusetts acts of 1755 and 1785, the New York act of 1756 and the Stamp Act of 1765, the Minnesota statute is in part a tax on paper. Indeed, it outdoes them by also taxing ink. "[T]his is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

In Grosjean, the Court said nothing about Huey Long and the political background of the newspaper tax. Even the issue of equal protection, relied on by the district court, American Press Co. v. Grosjean, 10 F. Supp. 161 (E.D. La. 1935), was omitted from this Court's discussion, because the Court preferred to emphasize first amendment principles. The Court's opinion, by Justices Suther-

land and Cardozo, stood on high ground:

> The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

297 U.S. at 250.

The Minnesota Supreme Court seeks to drain this paragraph of its force by omitting several of its sentences. 314 N.W.2d at 206. But even what remains can be given the interpretation urged by that court only if one has not read the remainder of the Court's opinion, for the words "in the light of its history and of its present setting" are the only words in the entire opinion that can be read as referring in any way to the political situation in Louisiana.

Other courts, however, sought to narrow the impact of Grosjean by emphasizing the matters this Court had chosen to omit. A justice of the Arizona Supreme Court immediately characterized Grosjean as based on "a situation . . . in the state of Louisiana which was unparalleled in American history." Giragi v. Moore, 49 Ariz. 74, 85, 64 P.2d 819, 823 (Lockwood, J., concurring), appeal

dismissed, 301 U.S. 670 (1937). As a distinction, however, this was surely overkill, because the Arizona tax applied to "the sales or gross income of practically every person or concern engaged in selling merchandise or services in the state." 49 Ariz. at 79, 64 P.2d at 821. No tax could more easily be distinguished from the tax only on newspapers with a circulation exceeding 20,000 in Louisiana, or the tax only on newspapers using more than $100,000 worth of paper and ink in Minnesota.

This Court has not sought to confine Grosjean to its "unparalleled" facts. Instead it has treated burdens that single out newspapers as highly suspect, but general regulation and taxation, in which newspapers are treated like all or most other enterprises, as proper. For example, in Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946), a newspaper was

held subject to the Fair Labor Standards Act of 1938. The Court distinguished Grosjean:

> There the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation. No such vice inheres in this legislation. As the press has business aspects, it has no special immunity from laws applicable to business in general. [Citation omitted.][7]

Id. at 184. Much the same point seems to have been made in Grosjean itself, when

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[7] The Court continued:

> And the exemption of small weeklies and semi-weeklies is not a "deliberate and calculated device" to penalize a certain group of newspapers. Grosjean v. American Press Co., supra, p. 250. As we have seen, it was inserted to put those papers more on a parity with other small town enterprises. [Citation omitted].

327 U.S. at 184. Plainly there is no evidence of such a benign intent in the present case. Quite the contrary: if it is accepted arguendo that the so-called "use tax" is to compensate for a sales-tax exemption, the smaller Minnesota newspapers are given an advantage not enjoyed by "other small town enterprises," which are subject to sales taxes.

the Court observed, "The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented." 297 U.S. at 250.

Although the Arizona Supreme Court's reading of Grosjean was extremely narrow in Giragi v. Moore, supra, this Court's dismissal of the appeal appears to have been justified on the facts. The Court can hardly be expected to make a habit of accepting cases for oral argument and disposition by full opinions merely to affirm with more narrowly stated reasons.

The present decision, in sharp contrast, will, if allowed to stand, open the door to widespread use of a particularly burdensome and offensive tax at a moment when the press is particularly vulnerable.

III. THE MINNESOTA SUPREME COURT CORRECTLY STATED THAT STRICT SCRUTINY WAS APPROPRIATE, BUT FAILED TO APPLY THAT RULE; ANALYSIS OF THE FACTS SHOWS, HOWEVER, THAT EVEN THE MINIMUM RATIONALITY OF THE STATUTE IS IN DOUBT.

A.

The Minnesota Supreme Court did not just misinterpret or alter strict scrutiny; it did not apply the rule at all.

Applying the standard analysis, we would say that the Minnesota statute's classification affects the fundamental freedom of speech and the press.[8] Ac-

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[8] The equal protection/fundamental freedom statement of the problem in the text is the analysis preferred by the Minnesota Civil Liberties Union. It would appear, however, that a tax graduated in this way unconstitutionally denies equal protection if applied to any sort of business, even without first amendment overtones. Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, rehearing denied, 295 U.S. 768 (1935).

cordingly, strict scrutiny is appropriate:

> This test means that the justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end. . . . The Court will not accept every permissible government purpose as sufficient to support a classification under this test, but will instead require the government to show that it is pursuing a "compelling" or "overriding" end--one whose value is so great that it justifies the limitation of fundamental constitutional values. Even if the government can demonstrate such an end, the Court will not uphold the classification unless the justices have independently reached the conclusion that the classification is necessary to promote that compelling interest. If the justices are of the opinion that the classification need not be employed to achieve such an end, the law will be held to violate the equal protection guarantee.

J. Nowak, R. Rotunda & J. N. Young, Constitutional Law 524 (1978). See Elrod v. Burns, 427 U.S. 347, 362-363 (1976).

The classification established by the third paragraph of Minn. Stat. § 297A.14 is (1) newspapers using over $100,000 worth of paper and ink, and (2) everyone else. The Minnesota Supreme Court asserts that the relevant governmental interest is revenue raising, and that "[t]his is perhaps the most compelling goal of a state government." Minneapolis Star and Tribune Co. v. Commissioner of Revenue, 314 N.W.2d 201, 207 (Minn. 1981). The court's analysis stops at that point, apparently indicating (1) that the necessity of this classification if this end is to be achieved is so self-evident as to make articulation superfluous, or (2) that a different rule of federal constitutional law applies in Minnesota. The latter would be along the lines of "any statute is permissible if it appears to be related to a compelling goal, such as raising revenue."

We are unwilling to presume, and we assume that this Court will not presume, that the Minnesota Supreme Court intended to defy all of this Court's modern rulings on equal protection. The Minnesota Supreme Court must therefore be understood to have meant that it had determined, through its independent examination of the facts, that the classification is necessary to revenue raising, and that this revenue could not be collected effectively without a classification of at least this general type.

But this too is nonsense. It is obvious that a great deal more revenue would be raised without the exemption of 97% of the state's newspapers and all of the out-of-state newspapers. That is, revenue raising may well be "the most compelling goal of a state government," 314 N.W.2d at 207, but it clearly is not the goal of § 297A.14, third paragraph.

The statute has no legislative history, and therefore no articulated purpose. But

> [s]tatutes that trench on fundamental liberties, like those affecting significantly the structure of our government, are not entitled to the same presumption of constitutionality we normally accord legislation. [Citation omitted.] The burden of justification is reversed; the burden rests upon government, not on the individual whose liberties are affected, to justify the measure. [Citation omitted.]

Nixon v. Administrator of General Services, 433 U.S. 425, 526-527 (1977) (Burger, C.J., dissenting). Even where a less exacting standard than strict scrutiny applies, the Court has ignored unarticulated rationales in striking down legislation. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 505 (1965) (White, J., concurring); Cleveland Board of Education v. LaFleur, 414 U.S. 632,

653 (1974)(Powell, J., concurring in the result).

In minimum rationality cases, this Court has sometimes accepted a "conceivable basis" for a statute whose purpose was not articulated, demanding only that the basis, assuming it to exist, would be legitimate, and that it not be inconsistent with the known facts. See, e.g., Allied Stores v. Bowers, 358 U.S. 522, 530 (1959). Even if that is the standard, the "big newspaper tax" is difficult to justify. If its purpose is posited to be giving smaller newspapers a competitive advantage over the larger ones, the Court has often stated that purpose to be unconstitutional. Buckley v. Valeo, 424 U.S. 1, 48 (1976); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Citizens Against Rent Control v. City of Berkeley, 102 S.Ct. 434 (1981).

In searching for a rationale, one is eventually compelled to inquire: if the state wished to tax newspapers as part of a general scheme of sales taxes, why did it not simply impose a sales tax on newspapers? One reason appears to be that in 1948 the Minnesota Attorney General advised the Minneapolis City Attorney that such a tax would be unconstitutional. Minn. Atty. Gen. Op. No. 90 (1948). It would seem to go without saying that if a sales tax on newspapers would be unconstitutional, any tax intended to compensate for the newspapers' sales-tax exemption must be equally unconstitutional.

If, on the other hand, a sales tax on newspapers would not be unconstitutional, the point of the "use tax" must be that it accomplishes something a sales tax could not. The Minnesota Supreme Court refers at one point to "the difficulties and expense of collecting sales

tax upon sales of such low-priced items," 314 N.W.2d at 207, but the Minnesota sales tax applies to other products costing as little as ten cents. Minn. Stat. § 297A.03. Beginning May 1, 1982, it will apply to candy and soft drinks. St. Paul Pioneer Press/Dispatch, March 20, 1982, at 1, col. 5.

Even if the real concern were, say, the difficulties in imposing tax-collection duties on carriers (who collect monthly or bi-monthly anyway, not daily), Minnesota could have adopted an exemption for newspapers delivered by carriers while imposing the tax on newspapers sold by others. See, e.g., W. Va. Code § 11-15-9(12).

"How often have I said to you that when you have eliminated the impossible, whatever remains, however improbable, must be the truth?" Attributed to Sher-

lock Holmes by A. C. Doyle, The Sign of Four (1890)(emphasis in original).

CONCLUSION

The tax on paper and ink necessarily reduces publication, if not directly then indirectly by forcing up the prices of advertising and subscriptions. But a tax that tends to discourage a constitutionally protected activity requires a heightened sensitivity to its particular effects. In this case, it is clear that the Minnesota Legislature has gained a weapon that can be used with great precision against particular newspapers. It is the very precision of the "use tax" that makes it such an offensive violation of the freedom of the press.

Compared to the enormous burden it places on free expression and particularly on a few big newspapers, this tax

generates a small portion of Minnesota's ($3.6 billion in fiscal 1980) overall revenues. But it provides a constant threat to a few publishers who must now look over their shoulders toward the legislature, knowing that it is capable of directly penalizing them without fear of affecting other business constituents. If the decision is allowed to stand, the same weapon may be available to the legislatures of other states.

The decision of the Minnesota Supreme Court undermines fundamental first amendment principles. The Minnesota Civil Liberties Union urges this Court to reverse summarily, or in the alternative to note probable jurisdiction and to set the case for full briefing and argument on the merits.

Respectfully submitted,

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